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No. _____

IN THE

Supreme Court of the United States

October Term 1980

JOSEPH S. CUTTITTA,

Petitioner,

vs.

ROMELINA GENE CUTTITTA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

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ROMELINA GENE CUTTITTA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of California.

QUESTION PRESENTED

1) Whether Federal Military Retired Pay, or Disability Pay received in lieu thereof, may be subjected to division pursuant to California's Community Property Law.

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REPORT OF OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth District, State of California is reproduced in Appendix "A". The denial of the Petition for Hearing by the California Supreme Court appears in Appendix "B".

JURISDICTION

Petitioner's appeal of this matter was denied by the California Court of Appeals on October 3, 1980. Thereafter, Petitioner timely sought review in the Supreme Court of California. Petitioner's application for review was rejected on November 29, 1980. This Petition for Writ of Certiorari has been filed within the time specified in 28 U.S.C. Section 2101(c). Jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent parts of the Constitutional and Statutory provisions cited by Petitioner in the following text are set out in full in Appendix "C".

STATEMENT OF THE CASE

In June of 1952 Petitioner entered the United States Navy and remained in the Navy as an Officer until September 1, 1978, at which time Petitioner elected to receive disability retirement pursuant to 38 U.S.C. §§ 331, 334, and 3105.

Petitioner and his wife were married on November 2, 1963, and they remained married for a period of approximately fourteen and one-half years.

During their marriage, Petitioner and his wife resided, pursuant to military order, in Italy, Florida, Maryland, and, in 1974, Petitioner was ordered to California where he and his wife resided in Long Beach, San Pedro, Alameda, and, finally, in San Diego.

On August 23, 1978, Petitioner's wife filed a Petition for Dissolution of Marriage in the Superior Court for the State of California, County of San Diego.

On November 7, 1979, Petitioner's wife was granted her request for dissolution of marriage, and, after trial, Petitioner's wife was awarded a one-half interest in her and Petitioner's community property. As a part of that award, Petitioner's wife was given a 27.8 percent interest in Petitioner's military retired pay.

As the Court stated at the time of trial:

> "Respondent (Petitioner herein) entered into military service on June 27, 1952. He retired on September 1, 1978 and elected a disability retirement. The length of marriage is 175 months. The length of respondent's service is 315 months. The community share of the military pension of respondent, referred to as 'retired pay', is 55.6%. Petitioner has a property right to 27.8% of the gross retirement monthly. 'Gross retirement' means that sum which respondent would receive as retired pay in absence of disability. Petitioner should share in any increases except enlargements related to respondent's disability. Respondent presently has a disability rating of 30%, which is on appeal.
>
> "The gross 'retired pay' each month is $1,322.89. Petitioner's share is $367.76. Respondent's share is $955.13. . . ."

The above distribution of the military retirement was incorporated in the Final Judgment of Dissolution of Marriage.

Petitioner appealed from the judgment of dissolution of marriage, contending that the trial court's award of an interest in his military retired pay violated the Supremacy Clause of the United States Constitution and the principles enunciated by this Court in *Hisquierdo vs. Hisquierdo,* 439 U.S. 572 (1979).

Petitioner's appeal was denied. Thereafter, Petitioner timely filed a Petition for Hearing with the Supreme Court of California. On November 29, 1980, the Petition for Hearing with the California Supreme Court was rejected, and Petitioner has filed this Petition for Writ of Certiorari.

ARGUMENT

I.

THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH ANOTHER STATE DECISION ON THE PRECISE ISSUE PRESENTED.

Relying on this Court's decision in *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979), the Alaska Supreme Court held in *Cose v. Cose,* 592 P.2d 1230 (Alaska 1979) that federal military retired pay was not marital property divisible on dissolution of marriage.[1] Other states have reached a substantially similar result [see *Ellis v. Ellis,* 191 Colo. 317, 552 P.2d 506 (1976); *Fenney v. Fenney,* 259 Ark. 858, 537 S.W.2d 367 (1976)].

In contrast, the California Supreme Court ruled below that despite *Hisquierdo v. Hisquierdo,* and recent federal legislation, California was "not precluded" from applying its community property law to mlitary retired pay, military insurance policies, or veteran's disability pay

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[1] *Cose* is presently before this Court on petition for writ of certiorari. Docket Number 79-1469.

received in lieu of retired pay [see *In re Marriage of Milhan*, 27 Cal.3d 765, 780 (1980)].[2]

Other states have also reached California's result [see, *e.g.*, *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Payne v. Payne*, 82 Wash.2d 573, 512 P.2d 736 (1973)].

The result of this patchwork of state law falls particularly hard on career military personnel. Unlike virtually any other occupation or employment one can name, the military serviceman is subject to recurring obligations to relocate himself, and often his family, all over the United States and to many corners of the world. The serviceman is not free to choose the jurisdiction in which he will be assigned to duty or to refuse a duty assignment once made.

The property consequences are obvious and profound. Depending upon where the serviceman is assigned, the military retired pay which is earned can be treated as nondivisible separate property income or community property to which the non-military ex-spouse has a continuing claim.

Military retirement benefits constitute a federally created right, affecting great numbers of people, and the Congress which created those rights could only have intended that their application be uniform throughout the several states. Presently, however, military retirement benefits are the hopeless subject of varied and conflicting state laws, which have had the effect of substantially altering the application and the availability of those benefits from state to state. Accordingly, Petitioner submits that the Court's review of this matter would be both appropriate and necessary, as this Court has within its power the ability to provide for uniformity in the application of military retirement pay originally intended and necessary to accomplish the objectives of Congress.

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2 *In re Milhan* is presently before this Court on Petition for Writ of Certiorari, Docket Number 80-578.

II.

THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

A. California's Community Property Law May Not Be Applied To Federal Military Retired Pay, Or To Disability Pay Received In Lieu Thereof, In Light Of This Court's Decision In *Hisquierdo vs. Hisquierdo* And Other Decisions Of This Court Interpreting The Supremacy Clause Of The United States Constitution.

The Military Retirement Plan [10 U.S.C. §§ 1255 *et seq.*], which provides retirement and similar benefits to servicemen in the United States Military, is entirely the creation of the U.S. Congress and is under its complete control. It is a national program, financed entirely by federal taxes, and is entirely the subject of federal law [see, *e.g., United States v. Smith,* 393 F.2d 318 (5th Cir. 1968); and *see United States v. Larionoff*, 431 U.S. 864 (1977)].

In this regard, Petitioner notes that it has been long established by this and other federal courts that, to the extent that state law is in conflict with federal provisions, the Supremacy Clause of the United States Constitution mandates that federal law prevail [*see e.g., Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1950)].

The test, as recently expressed by this Court in *Hisquierdo*, is whether the right asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition [*Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)].

Petitioner contends that the application of California's community property law to military pensions,[3] and to Veteran's Administration disability pay,[4] directly conflicts with the express terms of the military retirement plan created by the United States Congress.

Notably, in this regard, Congress has explicitly stated that federal military retirement pay is to be the "personal entitlement" of the serviceman, "payable to the member himself as long as he lives" [1968 U.S. Code Cong. & Admin. News, p. 300; *also see* S. Rep. No. 1480, 90th Cong., 2d Sess. (1968)].

Furthermore, Petitioner notes that in providing an annuity plan, and thus in providing support for the serviceman's widow or family, Congress again expressed its intention that military retirement pay be the exclusive property of the serviceman.

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[3] Under California law, retirement benefits are generally held to be community property (and thus are subject to equal division between husband and wife upon the dissolution of their marriage) to the extent that the benefits are earned during marriage [In *In re Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974)].

[4] Disabled servicemen have two options under 10 U.S.C. § 1401, which governs the computation of retirement pay for all of the armed services. First, in the case of nondisabled servicemen, retirement pay may be computed solely on the basis of rank and length of service. As noted above, under *Fithian* [*supra*, 10 Cal.3d 592], all of this amount is community property to the extent it is earned during marriage. Second, the disabled serviceman may choose to have his retirement pay computed by multiplying his basic pay by the percentage of disability before retirement. In *In re the Marriage of Stenquist*, 21 Cal.3d 779, 148 Cal.Rptr. 9 (1978), the California Supreme Court held that selection of "disability" computation does not defeat the community interest in the amount of retirement pay that would have been due based on rank and length of service. Only the excess of the "disability" pension over the latter amount was held to be separate property.

The annuity scheme provided by Congress provides that the serviceman may use up to fifty percent of his military retired pay to purchase annuities provided by the federal government [*see* 10 U.S.C. § 1434]. The decision whether to convert his retirement pay to annuity, and to what extent, has been left entirely to the discretion of the serviceman [10 U S.C. § 1431].

Thus, it seems obvious that the intent of Congress was to make the annuity available to the serviceman, by the purchase of annuity with retirement pay, *in an amount which the serviceman, alone, deems necessary or appropirate.*

Surely, however, application of community property law to military retired pay would directly frustrate this expressed intent of Congress. The amount of retired pay available to the serviceman to purchase annuities would be directly diminished, and therefore unavailable to the serviceman to purchase annuities, to the extent that it is made an award to the serviceman's ex-spouse. As such, the serviceman would not be able to control the distribution of his retirement benefits solely within his own discretion, as, Petitioner submits, Congress intended.

Even more compelling, Petitioner notes that in providing for retirement pay and for an annuity for servicemen, Congress, as it did in the case of the Railroad Retirement Act,[5] expressly embodied its own community concept, and Petitioner submits that application of California's community property law to the Military Retirement Scheme would be in direct contradiction to Congress' express intent in this regard.

As part of the annuity plan provided by Congress, the serviceman may not only take advantage of the annuity at his discretion by the

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[5] 45 U.S.C. §§ 312 *et seq.* Pensions available under the Railroad Retirement Act were held to be invulnerble to the application of California's community property law in *Hisquierdo v. Hisquierdo, supra,* 439 U.S. 572.

purchase of the annuity with his retirement pay, the serviceman may choose his beneficiary. *Notably, however, one exception is that the serviceman's ex-wife may not be named as the serviceman's beneficiary* [see U.S.C. § 1435].

Furthermore, Petitioner notes that Congress has expressly made the serviceman's annuity non-assignable or otherwise subject to execution, levy, attachment, garnishment, or other legal process [*see* 10 U.S.C. § 1440].

As such, we know that, even if the serviceman were permitted to name his ex-spouse as the beneficiary of his annuity, if the serviceman failed to do so no portion of the annuity could be awarded to the ex-spouse, even though under community property law the ex-spouse might otherwise be entitled to participate in the annuity to the extent that the annuity was purchased with community property assets [*Wissner v. Wissner, supra*].

Congress' expression in this regard--making up to 50% of military retired pay transferable to annuity, and making that annuity absolutely unattainable by the serviceman's ex-spouse--must take precedence over California's community property scheme [*see Hisquierdo v. Hisquierdo, surpa*; and *see Wissner v. Wissner, supra*]. Petitioner submits, however, that this would not be the case if the serviceman's retirement pay were permitted to be made the subject of California's community property law.

In addition to being in conflict with the express *dictates* of Congress,[6] Petitioner submits that application of California's community property

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[6] Congress has also indicated its intent in this regard by its silence. Although Congress has expressly recognized the applicability of community property law to benefits received under the Civil Service Retirement Act [*see* 5 U.S.C. § 8345], bill after bill has been introduced over the last few years to

(Footnote continued on page 9)

law to payments received under the military retirement scheme would substantially frustrate the *objectives* of that plan. Thus, Petitioner submits that, as this Court found in the case of the Railroad Retirement Act,[7] application of community property law to military benefits is precluded by the Supremacy Clause.

No less so than in the case of the Railroad Retirement Act, the benefits provided to servicemen by the military retirement program have been provided by Congress to "support . . . [former] employee[s] [in their] old age" [*Hisquierdo v. Hisquierdo, supra,* 439 U.S. at 585]; and, no less so than in the case of the Railroad Retirement Act, would application of California's Community Property Law frustrate the objectives of the Military Retirement Program.

In providing support to servicemen after they have retired, Congress fixed a specific amount, computed on the basis of rank and length of service, which Congress determined to be adequate to support the serviceman [*see, e.g.,* 10 U.S.C. § 1401, *et seq.*]. In doing so, Congress must have expected that such benefits would be wholly available to the serviceman, and that as such they would be uniformly available throughout each of the several states.

Furthermore, Petitioner notes that, in addition to Congress' desire to provide support for the retired serviceman, it would seem obvious that by providing for retirement benefits in the manner in which they did Congress intended by the provision of such benefits to encourage

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(Footnote 6 continued)

provide for the similar application of community property law to military retired pay but none has ever been reported out of committee [*see* H.R. Rep. No. 2817, 96th Cong., 1st Session (1979); H.R. Rep. No. 11354, 95th Cong., 2nd Session (1978); and H.R. Rep. No. 13020, 95th Cong., 2nd Session (1978)].

[7] See Footnote No. 5.

civilian men and women to voluntarily enter the military services, and, having once entered, to remain in the military.[8]

In this regard, Petitioner submits that if retirement benefits provided by Congress to servicemen are left subject to the vagaries of the various state legal processes, the incentive which Congress has provided to encourage servicemen to remain in the military would be substantially reduced.

This is especially true where, as in the present case, the serviceman is subject to transfer from jurisdiction to jurisdiction throughout the serviceman's career. Since the serviceman is as likely as not to be domiciled in a community property state at the time he seeks to dissolve his marriage,[9] the married serviceman may legitimately consider his retirement benefits to be only as valuable as one-half of that which Congress intended them to be. Clearly, such a predicament diminishes the attractiveness of a military career, and, thereby, directly frustrates the objective of Congress in providing military retirement benefits.

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[8] Military retirement benefits are such that they do not vest, and therefore are not guaranteed to the serviceman, until the serviceman has served at least twenty years in the military [*see, e.g.,* 10 U.S.C. § 6323]. The apparent effect of such a provision would be, as the California Supreme Court noted in its decision in *In re Milhan, supra,* 27 Cal.3d 765, to encourage servicemen to remain in the military, at least for the time required for their retirement to vest.

[9] On the other hand, the spouse of the serviceman may choose the jurisdiction in which she prefers to bring an action for dissolution of marriage. For example, California merely requires that a spouse be a resident of the state for six months prior to filing an action for the dissolution of his or her marriage [*see* California Civil Code § 4530]. Thus, even more so than in the case of the serviceman who seeks the dissolution of his marriage and who has no control over his domicile, in the case of the serviceman's spouse, who *can* choose the jurisdiction in which she desires to bring an action for dissolution of marriage, unless application of military retirement benefits is made uniform among the states the married serviceman may legitimately fear that his retirement benefits will be only as valuable as one-half of that which Congress intended them to be.

It is apparent that the division of the serviceman's retirement benefits by the application of California's community property law directly frustrates the objectives as well as the express dictates of Congress. As such, Petitioner respectfully contends that application of California's community property law to military retirement benefits would do "major damage" to "clear and substantial" federal interests, and that therefore the Supremacy Clause of the United States Constitution demands that application of the California law be overridden.

B. The Decisions Of The California Courts Conflict With Federal Decisions Defining The Nature Of Military Retired Pay.

Following this Court's decision in *U.S. v. Larionoff,* 431 U.S. 864 (1977), the Court of Appeals for the Ninth Circuit held that military retired pay "does not differ from active duty pay in its character as pay for *continuing military service*" [*Costello v. U.S.,* 587 F.2d 424 (9th Cir. 1978), *cert. denied,* 442 U.S. 929 (1979) (emphasis added)]. Indeed, military retired pay has long been considered to be compensation paid in consideration of the serviceman's continued availability to the military establishment [*see, e.g., Hostinsky v. United States,* 292 F.2d 508, 510 (Ct. Cl. 1961); *Lemly v. United States,* 75 F.Supp. 248, 249 (Ct. Cl. 1948)].

The judicial recognition that a retired military serviceman receives his retired pay for continuing services to the country is well-founded. At the outset of his retirement, Petitioner was restricted in the businesses he could pursue and would have forfeited his retired pay if his conduct was in violation of law [37 U.S.C. § 801(c)]. On a continuing basis, he is obligated to submit to recall to active duty in the service of his country [10 U.S.C. § 6481]. Indeed, Petitioner is still considered to be a member of the armed services [*see, e.g., United States v. Hooper,* 9 C.M.A. 637 (1958)].

Under California community property law, income for services rendered after separation of the married parties is held to be the separate property of the person who has rendered his services [*see* California Civil Code § 5118]. To the extent that military "retired" pay constitutes remuneration for the continuing obligations of the serviceman after "retirement" from active duty, such remuneration should be, as in the case of all other income earned after separation, the separate property of the serviceman.

To do otherwise would be to inequitably cast upon *one* member of the former marital community the continuing burdens of earning the military retired pay which is enjoyed by *both*. If the retired pay system is to successfully function as a career incentive and as an inducement for the post-retirement lifetime availability to the military of the knowledge and experience represented in the pool of retired servicemen, then the retired pay cannot be diverted to an ex-spouse who does not contribute to earning it.

Non-division of retired pay, moreover, does not result in injustice because, as this Court pointed out in *Hisquierdo,* marital *support*--which would take into account the military member's ability to pay as well as the ex-spouse's demonstrated need--would still be a remedy to state courts.

III.

THE DECISION OF THE STATE COURT BELOW INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

As outlined in previous sections, the case law defining marital property rights in military retired pay is in conflict from jurisdiction to jurisdiction and between the state and federal courts. Unfortunately, legislative guidance provides little additional assistance.

With legislative resolution of the issue not apparently likely in the foreseeable future and with the judge-made law in disarray, the courts as well as the thousands of servicemen and their families throughout the several states, are left without authoritative guidance in this important area. Moreover, at a time when success of the all-volunteer military is in doubt and the services face the challenge of retaining experienced career personnel, the need to define the nature and scope of rights to military benefits--retired pay, life insurance and disability pensions--has become particularly acute. The matter now before the Court presents the opportunity of resolving these vital questions.

CONCLUSION

For the reasons stated above, Petitioner respectfully contends that a Writ of Certiorari should issue to review the decision below.

Respectfully submitted,

WADDELL, BRIGGS & BECCARELLI

By: PATRICK J. BRIGGS

Attorneys for Petitioner,
Joseph S. Cuttitta

APPENDICES

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.
FILED
OCT 3 - 1980
ROBERT L. FORD, Clerk
DEPUTY CLERK

In Re Marriage of Romelna Gene and Joseph S. Cuttitta.

ROMELNA GENE CUTTITTA,

Respondent,

v.

JOSEPH S. CUTTITTA,

Appellant.

4 Civ. No. 22440

(Super. Ct. No. D. 130660)

APPEAL from a judgment of the Superior Court of San Diego County. Douglas R. Woodworth, Judge. Affirmed.

Military retirement and disability benefits are at issue.

The trial court found husband began military service in June 1952 and retired 315 months later, September 1, 1978. The parties' marriage began in November 1963 and and was dissolved 175 months later. Following the *Stenquistian* formula, 55.6 percent of husband's military pension is community property, half of which is 27.8 percent belonging to wife. Wife would not share in any increased disability sums due husband.

Husband's military retirement pension is community property, unaffected by *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (*In re Marriage of Milhan*, 27 Cal.3d 765; *In re Marriage of Stenquist*, 21 Cal.3d 779.) Any part of husband's disability pay which is in lieu of retirement pay is subject to division as community property (*Milhan and Stenquist, supra*).

Judgment affirmed.

Brown

BROWN, P.J.

WE CONCUR:

Stanford

J.

Work

J.

B-1

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

NOV 23 1970

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 22440

Marriage of Cuttitta

vs.

Respectfully,

Clerk

5 U.S.C. § 8345

(j)(1) Payments under this subchapter [5 USCS §§ 8331 et seq.] which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

10 U.S.C. § 1401

The monthly retired pay of a person entitled thereto under this subtitle [10 USCS §§ 101 et seq.] is computed according to the following table. For each case covered by a section of this title [10 USCS §§ 1 et seq.] named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title [10 USCS §§ 1 et seq.]. (For table see 10 U.S.C. § 1401.)

10 U.S.C. § 1431

(b) To provide an annuity under section 1434 of this title, a person covered by subsection (a) may elect to receive a reduced amount of the retired pay or retainer pay to which he may become entitled as a result of service in his armed force.

10 U.S.C. § 1434

(a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436(a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per centum of his retired or retainer pay, in no case less than $25.

10 U.S.C. § 1435

Only the following persons are eligible to be made the beneficiaries of, or to receive payments under, an annuity elected under this subchapter [10 USCS §§ 1431 et seq.] by a member of the armed forces:

(1) The spouse of the member on the date when the member is retired or becomes entitled to retired or retainer pay or, if the member was already retired or entitled to retired or retainer pay on November 1, 1953, the spouse on that date.

10 U.S.C. § 1440

No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 6323

(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

10 U.S.C. § 6481

In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore. At any other time the Secretary may order such a retired officer to active duty at sea or on shore only with his consent.

37 U.S.C. § 801

(c) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

Cal. Civ. Code § 4530

(a) A judgment decreeing the dissolution of a marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.

Cal. Civ. Code § 5118

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding.

NO. 80-1469

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

JOSEPH S. CUTTITTA,

Petitioner,

vs.

ROMELINA GENE CUTTITTA,

Respondent.

OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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Chula Vista, California 92010
Telephone: (714) 426-7550

Of Counsel:

BOWMAN AND GEERDES

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OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully prays that the court not grant a Writ of Certiorari to review the Final Judgment of the Supreme Court of the State of California.

STATEMENT OF FACTS

The parties were married on November 2, 1963. On August 23, 1978, Romelina Gene Cuttitta filed a Petition for Dissolution of Marriage from Joseph S. Cuttitta. At that time the parties had been married 14 years 6 months 15 days. Listed as a community property asset in the Petition was: "7. Respondent's military retirement."

At the time the Petition for Dissolution was filed, Appellant was on active duty as a Lt. Commander in the U. S. Navy but was being transferred to the temporary disability retired list, effective September 1, 1978. Appellant entered the military June 27, 1952. Appellant's Response to Petition for Dissolution stated:

> "Respondent does not feel there is any community property subject to disposition by the Court in this proceeding, but if there eventually appears to be property subject to disposition of this Court, respondent will seek permission to amend his Response to include same at that time."

In 1974 the parties moved to California residing in Long Beach, San Pedro, Alameda and finally to San Diego in 1976.

At the time of trial the Court found that:

> "Respondent entered into military service on June 27, 1952. He retired on September 1, 1978, and elected a disability retirement. The length of marriage is 175 months. The length of respondent's service is 315 months. The community share of the military pension of respondent, referred to as 'retired pay', is 55.6%. Petitioner has a property right to 27.8% of the gross retirement monthly. "Gross retirement" means that sum which respondent would receive as retired pay in

> absence of disability. Petitioner should share in any increases except enlargements related to respondent's disability. Respondent presently has a disability rating of 30%, which is on appeal.
>
> "The gross 'retired pay' each month is $1,322.89. Petitioner's share is $367.76. Respondent's share is $955.13..."

The above distribution of the military retirement was incorporated in the Judgment After Bifurcation.

STATEMENT OF THE CASE

This is an appeal from a Judgment After Bifurcation and entry of Judgment for Dissolution of Marriage.

Petition for Dissolution of Marriage was filed on August 23, 1978.

An Interlocutory Judgment of Dissolution of Marriage was then entered on March 23, 1979. At this time proceedings were bifurcated and the court reserved jurisdiction to hear and decide all other issues raised by the Petition and Response filed in this matter.

Final Judgment of Dissolution of Marriage was entered June 1, 1979. Trial in this matter came on regularly for hearing, and trial was had on August 14, 15 and 16, 1979, before the Honorable Douglas R. Woodworth, Judge of the Superior Court in and for the County of San Diego, sitting without jury.

Findings of Fact and Conclusions of Law were entered on November 7, 1979. Judgment After Bifurcation was then entered on November 7, 1979, and was duly entered in Judgment Book 1252 at Page 108, on the same day.

Appellant filed Notice of Appeal on November 7, 1979. Appellant's appeal brief was filed on July 8, 1980.

ARGUMENT

I

THE DECISION OF THE STATE COURT BELOW INVOLVES THE SAME QUESTION OF LAW AS BEING CONSIDERED IN THE McCARTY CASE ALREADY UNDER CONSIDERATION BY THIS COURT SUCH THAT GRANTING A WRIT OF CERTIORARI WOULD RESULT IN DUPLICATION.

To grant a Writ of Certiorari in this case would result in duplication of effort by the Court and Counsel since In Re Marriage of McCarty (1980) U. S. 80-5, is under consideration at this time. The McCarty case, as this case, involves the issue of military retirement as part of division of community and quasi-community property under California law.

CONCLUSION

Respondent respectfully contends a Writ of Certiorari not issue.

Respectfully submitted,

BOWMAN AND GEERDES

By: _____
FRANKLIN GEERDES

Attorneys for Respondent
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Attorney for Respondent

SUPREME COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

JOSEPH S. CUTTITTA,

Petitioner,

-vs-

ROMELINA GENE CUTTITTA,

Respondent.

NO. 80-1469

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF

The Respondent moves the Court as follows:

For leave to proceed in forma pauperis in this appeal based upon the affidavit filed herewith allowing the filing of briefs and documents pursuant to Rule 46 of this Court.

Dated: May 19, 1981

Garry J. Bowman
GARRY J. BOWMAN
Attorney for Respondent

COMMONWEALTH OF VIRGINIA)
)
COUNTY OF_____).

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ROMELINA GENE CUTTITTA, declare as follows:

That I have no funds whatsoever to pay for costs of this appeal and have not paid any attorney fees regarding such appeal

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and would not be able to proceed herein unless leave is permitted to proceed in forma pauperis.

Executed on May 28, 1981 at Day, Virginia.

Romelina Gene Cuttitta
ROMELINA GENE CUTTITTA
Respondent

Subscribed and Sworn to before me this 28 day of May, 1981.

Notary Public in and for 10-19-84

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